No. 97-59

FILED

SEP 17 1997

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

ANTHONY DE MEO,

Petitioner,

—v.—

SMITH BARNEY INC., TRAVELERS, INC. and TONI ELLIOTT,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI OR, IN THE ALTERNATIVE, MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY

ARTHUR M. WISEHART
Counsel of Record

WISEHART & KOCH
19 West 44th Street
Suite 412
New York, New York 10036
(212) 730-0044

Counsel for Petitioner

40 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. MANDAMUS IS APPROPRIATE BECAUSE THE CIRCUMSTANCES IN THIS CASE ARE EXTRAORDINARY ... 1

II. MANDAMUS IS WARRANTED BECAUSE THE DISTRICT COURT DEPRIVED PETITIONER OF HIS RIGHT TO A JURY TRIAL 7

CONCLUSION 10

APPENDIX RA1

TABLE OF AUTHORITIES

Page(s)

Cases:

Dairy Queen, Inc. v. Wood,
369 U.S. 469 (1962) 7-8

De Beers Consol. Mines, Ltd. v. United States,
325 U.S. 212 (1945) 2

Far East Conference v. United States,
342 U.S. 570 (1952) 2

Filanto, S.P.A. v. Chilewich Int'l Corp.,
984 F.2d 58 (2d Cir. 1993) 3, 4

In re Hooker Investments, Inc.,
937 F.2d 833 (2d Cir. 1991) 8

United States Alkali Export Ass'n v.
United States,
325 U.S. 196 (1945) 2, 3

Constitutional Provision:

U.S. Const. amend. VII 9

Page(s)

Statutes:

Federal Arbitration Act,
9 U.S.C. § 4 . . . . . 4, 9, 10

28 U.S.C. § 1254(1) 1

All Writs Act,
28 U.S.C. § 1651(a) 1

Age Discrimination in Employment Act,
29 U.S.C. §§ 621, et seq. 3, 4, 7

29 U.S.C. § 626(c)(1) 4

29 U.S.C. § 626(c)(2) 4

Older Workers Benefit Protection Act,
29 U.S.C. § 626(f) 3, 4, 7, 9

29 U.S.C. § 626(f)(1) 4

29 U.S.C. § 626(f)(3) 4, 9

Other Authorities:

16B Wright-Miller-Cooper, Federal Practice
and Procedure § 4005 (2d Ed. 1996) 2

Wall Street Journal, September 12, 1997 5

EEOC Policy Statement on Mandatory Arbitration,
BNA's Emp. Disc. Rep., vol. 9
(July 16, 1997) 3, 5, 6

ARGUMENT

I. MANDAMUS IS APPROPRIATE BECAUSE THE CIRCUMSTANCES IN THIS CASE ARE EXTRAORDINARY

Respondents' brief incorrectly states that petitioner "presents no argument on the threshold issue of appellate jurisdiction" (Res. Br. p. 7), completely ignoring the jurisdictional statement in the Petition and authorities cited therein under both 28 U.S.C. § 1254(1) "or, in the alternative, under the All Writs Act, 28 U.S.C. § 1651(a)." (Pet. p. 2.)

Moreover, respondents failed to cite a single case that deals with the availability of mandamus review despite the fact that the Petition filed herein, with permission explicitly given by the Clerk of the Court, plainly states that it is for review by certiorari "or, in the alternative, mandamus," and sets forth both the statutory and precedential basis for such jurisdiction on page 2. (Pet. p. 2.)

In addition, respondents have completely ignored the significance of extraordinary circumstances presented by this case. Respondents rely solely on the distinction between interlocutory and final judgments, or "independent" and "embedded" proceedings, to assert that the district court's order compelling arbitration is not reviewable by this Court. (Res. Br. pp. 3-5.)

If respondents' argument prevails, this issue will perpetually avoid effective review by this Court. However, it is established that mandamus relief is available under the All Writs Act, 28 U.S.C. § 1651(a), which states, in pertinent part, "The Supreme Court . . . may issue all writs necessary or appropriate in aid of [its] respective jurisdiction[] and agreeable to the usages and principles of law."

As stated in 16B Wright-Miller-Cooper, Federal Practice and Procedure, § 4005, p. 109, note 43 (2d Ed. 1996):

> "Notwithstanding [the] deference to the final judgment rule, the Supreme Court itself has frequently resorted to extraordinary writ review specifically for the purpose of avoiding perceived hardships that would result from awaiting a final judgment."

See also Far East Conference v. United States, 342 U.S. 570 (1952); De Beers Consol. Mines, Ltd. v. United States, 325 U.S. 212 (1945); United States Alkali Export Ass'n v. United States, 325 U.S. 196 (1945).

Similar circumstances to those raised here were presented in United States Alkali Export Ass'n v. United States, 325 U.S. 212 (1945), in which a district court denied a motion to dismiss a claim under federal anti-trust law on the grounds that the Federal Trade Commission ("FTC") retained exclusive jurisdiction over the claim. Id. at 204. This Court held that the district court's denial was reviewable by the Supreme Court despite the fact that the district court's denial was not a final order. The Court stated (United States Alkali, 325 U.S. at 205):

> "The hardship imposed on petitioners by a long postponed appellate review, coupled with the attendant infringement of asserted Congressional policy of conferring primary jurisdiction on the [Federal Trade] Commission, together support the appeal to the discretion of this Court to exercise its power to review the ruling of the district court in advance of final judgment."

The Court based its decision, in part, on the conflict

between the district court's jurisdiction and the jurisdiction and the rights claimed by the associations to have their case decided by the FTC. Id. at 203.

This Court should not require petitioner to await a final judgment by an arbitrator before appealing the district court's order. Petitioner, like the export associations in United States Alkali, will suffer great hardship if this Court does not issue a writ of mandamus because petitioner will be compelled to arbitrate. The EEOC Policy Statement (discussed below) dated July 10, 1997, issued three days after the Petition in this case was filed, makes clear the inherent inferiority of mandatory arbitration in such cases, and that individuals who are forced to arbitrate statutory rights claims are exposed to a great risk of having those rights abrogated.

Respondents ask this Court to require the petitioner to "bear the initial consequence of an erroneous district court decision requiring arbitration." (Res. Br. p. 5), (quoting Filanto, S.P.S. v. Chilewich Int'l Corp., 984 F.2d 58, 60-61 (2d Cir. 1993).) That consequence is an unreasonable burden for petitioner to bear. The jurisdictional and substantive issues are so intertwined that denying petitioner's Petition will strip him of his statutory rights under the ADEA, and thwart the intent of Congress to provide claimants such as petitioner a federal judicial forum in which to litigate their age discrimination claims.

The importance of the Supreme Court's review of the issues presented herein is a fortiori in this case because of the applicability of the Older Workers Benefit Protection Act, 29 U.S.C. § 626(f) ("OWBPA"), an amendment to the Age Discrimination in Employment Act, 29 U.S.C. §§ 621, et seq., ("ADEA") as discussed in Point II of the Petition for Writ of Certiorari or, in the Alternative, Mandamus dated July 7, 1997, at pp. 7-13. The statutory OWBPA protections did not apply

in Filanto, S.P.S. v. Chilewich Int'l Corp., 984 F.2d 58 (2d Cir. 1993), relied on by respondents. (Br. 5.)

The OWBPA provides protection against waivers of any "right or claim under this Act unless the waiver is knowing and voluntary." 29 U.S.C. § 626(f)(1). Included in the rights under the OWBPA, as an amendment to the ADEA, is the right to a trial by jury (29 U.S.C. § 626(c)(1) & (2), a statutory right not protected under the District Court's order compelling arbitration. (20a-24a)[1]

Under the OWBPA, the burden of proving that any such waiver is knowing and voluntary rests on the employer, Smith Barney, 29 U.S.C. § 626(f)(3). Smith Barney would not be able to satisfy this burden because of the ambiguous language contained in the boilerplate form used by the securities industry in 1972 relied upon by respondents which, under the principles established in Mastrobuono v. Shearson Lehman Hutton, Inc., 514 U.S. 52, 62-63, 115 S.Ct. 1212 (1995), must be construed against the party that drafted it.

Disputed fact issues were presented to the district court regarding whether there was an "knowing and voluntary" waiver by petitioner of his rights to a jury trial of his age discrimination claims and the existence of an agreement to arbitrate the dispute. (Pet. 11) However, instead of holding a jury trial on the issue as provided under Section 4 of Federal Arbitration Act (9 U.S.C. § 4) as requested by petitioner (23a), the district court compelled arbitration and failed to address the conflict with the statutory provisions of the OWBPA.

---

[1] Citations followed by the suffix "a" refer to the Appendix of the Petition for Writ of Certiorari, or, in the alternative, Mandamus.

The recently announced position of the Equal Employment Opportunity Commission ("EEOC") further demonstrates the extraordinary importance of this case. The EEOC Policy Statement on Mandatory Arbitration[2] (BNA's Emp. Disc. Rep., vol. 9, p. 87) ("Policy Statement"), (RA4-RA24), issued three days after the Petition herein was filed, explains in great detail the basis on which the EEOC opposes mandatory arbitration of statutory rights. Moreover, Ellen Vargyas, Legal Counsel for the EEOC, has stated "that [the EEOC] intend[s] to litigate in [its opposition to mandatory arbitration of discrimination claims]." Wall Street Journal, Sept. 12, 1997, p. B19. (RA1-RA3.)

The EEOC Policy Statement denounces arbitration as an unsuitable forum in such cases. (BNA's Emp. Disc. Rep. at p. 90) (RA14-RA19.) An arbitrator is not publicly accountable, (citing United Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574 (1960)), an arbitrator is not required to explain in writing the basis for an award, an arbitrator is not required to comply with the Federal Rules of Evidence or Civil Procedure, and judicial review of arbitration awards is extremely narrow. (BNA's Emp. Disc. Rep. at 90-91) (RA14-RA17.)

The most disturbing aspect raised by the EEOC's Policy Statement is the evidence presented that arbitration is biased in favor of employers-- particularly in a case like this one involving the securities industry. The EEOC cites a survey conducted in the securities industry which found that arbitration unduly favors employers, and subjects employers to modest damage awards. (BNA's Emp. Disc. Rep. at p. 91, fn. 14) (RA18.)

---

[2] The EEOC Policy Statement on Mandatory Arbitration appears in the Appendix at page RA4-24.

Furthermore, the recommendations of two federal commissions and the National Academy of Arbitrators exemplify the inadequacy of arbitration of statutory rights claims. The Commission on the Future of Worker-Management Relations ("Dunlop Commission") in its Report and Recommendations (1994) "strongly recommend[s] that binding arbitration agreements not be enforceable as a condition of employment[.]" (BNA's Emp. Disc. Rep. at p. 91 (quoting Dunlop Report at 32). (RA18.) The Dunlop Commission stated:

> "The public rights embodied in state and federal employment law -- such as freedom from discrimination in the workplace . . . -- are an important part of the social and economic protections of the nation." (alteration in original)

The United States Secretary of Labor's Task Force on Excellence in State and Local Government Through Labor-Management Cooperation ("Brock Commission") echoed the position of the Dunlop Commission. The Brock Commission's report, "Working Together for Public Service" (1996), stated that "ADR should normally not be used in cases that represent tests of significant legal principles or class action." Brock Report at p. 82. (BNA's Emp. Disc. Rep at p. 90, fn. 13) (RA16-RA17.) This case involves significant legal issues related to petitioner's claim of widespread age discrimination in the securities industry.

Moreover, the National Academy of Arbitrators opposes mandatory employee arbitration "when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights." National Academy of Arbitrators' Statement and Guidelines (adopted May 21, 1997), 103 Daily Lab. Rep. (BNA) E-1 (May 29, 1997). Because arbitration contains institutionalized bias, and arbitrators generally award

meager damages, arbitration encourages employers to believe that the violation of the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. ("ADEA"), the Older Workers Benefit Protection Act, 29 U.S.C. §626(f), and other federal civil rights legislation, will not expose them to serious risk.

The unanimous position of the EEOC, the Dunlop Commission, the Brock Commission and the National Academy of Arbitrators is convincing evidence that supports this Court's mandamus review of the district court's order.

II. MANDAMUS IS WARRANTED BECAUSE THE DISTRICT COURT DEPRIVED PETITIONER OF HIS RIGHT TO A JURY TRIAL

Respondents' brief relegates to a footnote (Res. Br. fn. 3, p. 8) the important issue involving petitioner's constitutional right to a jury trial.

Mandamus is available as a basis for review when jury trial rights have been infringed. As stated in Dairy Queen Inc. v. Wood, 369 U.S. 469, 472-3 (1969):

> "Our decision reversing that case not only emphasizes the responsibility of the Federal Courts of Appeals to grant mandamus where necessary to protect the constitutional right to trial by jury but also limits the issues open for determination here by defining the protection to which that right is entitled in cases involving both legal and equitable claims. The holding in Beacon Theatres was that where both legal and equitable issues are presented in a single case, 'only under the most imperative circumstances, circumstances which in view of the flexible procedures of the Federal Rules we cannot now

> anticipate, can the right to a jury trial of legal issues be lost through prior determination of equitable claims.' That holding, of course, applies whether the trial judge chooses to characterize the legal issues presented as 'incidental' to equitable issues or not. Consequently, in a case such as this where there cannot even be a contention of such 'imperative circumstances,' Beacon Theatres requires that any legal issues for which a trial by jury is timely and properly demanded be submitted to a jury." (Footnotes omitted.)

As stated in In re Hooker Investments, Inc., 937 F.2d 833, 837 (2d Cir. 1991):

> "Although we do not have jurisdiction over the Bank's attempted appeal as a matter of right from the non-final bar order, we may in appropriate circumstances treat an unsuccessful attempt to appeal as a petition for a writ of mandamus. See, e.g., Richardson Greenshields Securities, Inc.[v. Lau], 825 F.2d 647 (2d Cir. 1987). Indeed, the Bank has asked us to review the bar order under our mandamus power if we should find ourselves to be without statutory appellate jurisdiction. The Bank claims that the bar order threatens its seventh amendment right to a trial by jury in the adversary proceeding, and there is a clear line of cases holding that when an otherwise unappealable order denies a claimed right to a jury trial, immediate review may be obtained by way of a petition for mandamus." (Emphasis added.)

Thus petitioner's Seventh Amendment right to a jury trial can not be subverted by non-review of the district court's order. Contrary to respondents' contention (Br. p. 8, fn. 3), petitioner satisfied his burden to present genuine issues of triable fact with respect to whether an arbitration agreement even existed. (Petition, p. 11)

In contending that there is "no automatic jury trial rights" on such issue under Section 4 of the Federal Arbitration Act (Resp. Br. p. 8, fn. 8), respondents simply ignore the plain language of the statute which not only specifically provides for a jury trial of such issue, but also, contrary to the district court's order, provides that it shall take place before any arbitration can occur. The statute provides in pertinent part (9 U.S.C. § 4):

> "If the making of the arbitration agreement or the failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof. * * * Where such an issue is raised, the party alleged to be in default may, except in cases of admiralty, on or before the return day of the notice of application, demand a jury trial of such issue, and upon such demand the court shall make an order referring the issue or issues to a jury in the manner provided by the Federal Rules of Civil Procedure, or may specially call a jury for that purpose." (Emphasis added.)

Here, in contrast to respondents' contentions, petitioner has presented multiple triable issues of fact, and the burden to refute them is placed on respondents by the OWBPA, 29 U.S.C. § 626(f)(3). The disputed issues of fact are: first, whether the boilerplate application that petitioner was required to sign as a condition of employment applies to petitioner's age

discrimination claim; second, whether petitioner knowingly agreed to arbitrate any claims arising under statute; and third, whether petitioner was coerced into signing the registration application.

Given the incredibly ambiguous circumstances and language used in the purported arbitration agreement as shown by petitioner's affidavit (52a-96a), the only clear inference to be drawn is that a reasonable jury could decide these factual issues in petitioner's favor. Thus, the district court acted contrary to its jurisdiction under 9 U.S.C. § 4 when it did not submit such issues to a jury.

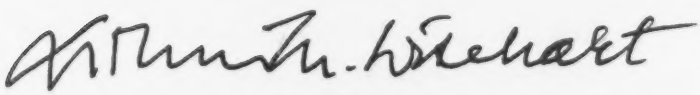
CONCLUSION

The petition for writ of certiorari, or, in the alternative mandamus, should be granted.

September 17, 1997

Respectfully submitted,

WISEHART & KOCH



Arthur M. Wisehart
(Counsel of Record)

19 West 44th Street, Suite 412
New York, New York 10036
(212) 730-0044
Attorneys for Petitioner

APPENDIX

TABLE OF CONTENTS FOR APPENDIX

Wall Street Journal,
September 12, 1997, p. B19 . . . . . RA1

EEOC Policy Statement on Mandatory Arbitration,
BNA's Emp. Disc. Rep., vol. 9,
July 10, 1997 . . . . . RA4

Article from
The Wall Street Journal of September 12, 1997
entitled

WALL STREET'S FORCED ARBITRATION OF BIAS CLAIMS SET BACK BY EEOC

BY MARGARET A. JACOBS AND PATRICK MCGEEHAN
Staff Reporters of THE WALL STREET JOURNAL

The Equal Employment Opportunity Commission took its strongest stand yet against mandatory arbitration of discrimination claims in the securities industry, making an unusual finding that the practice is illegal in the high-profile Smith Barney case.

The finding is being viewed as a sign that the EEOC is willing to go to court to fight mandatory arbitration policies. The EEOC, charged with enforcing federal antidiscrimination laws, has widely criticized the practice, most recently in a broad policy statement in July. It also went to court in at least one case to prevent an employer from firing people who refused to sign arbitration agreements. Individual commissioners, meanwhile, have been especially critical of securities-industry arbitration.

Ellen Vargyas, legal counsel for the agency, declined to comment on the finding. However, she said: "There's no question that we intend to litigate in this area."

Carrie Menkel-Meadow, a law professor at Georgetown Law Center, notes that, while the Supreme Court approved of mandatory arbitration in 1991, lower courts have been split on many issues that its decision left unresolved. The EEOC, she says, may be positioning itself to make sure the issue goes back to the high court.

"We read this as a broad proclamation that the EEOC won't condone mandatory arbitration as a condition of employment," says Linda Friedman, an attorney for the women who are suing Smith Barney Inc.

George Saks, general counsel for Smith Barney, said in a prepared statement: "While we are aware of the EEOC's view, numerous courts including the Supreme Court have consistently upheld the fairness of employee arbitration. We are happy to discuss this further as the EEOC has suggested."

The rare finding involves Eileen Valentino, a former broker in Smith Barney's Paramus, N.J., office. Ms. Valentino filed an arbitration complaint with the National Association of Securities Dealers, alleging sexual harassment against the brokerage house and several brokers in 1993. The NASD handles most arbitration cases for the securities industry, which requires employees to arbitrate discrimination complaints rather than take them to court.

Over Ms. Valentino's objections, a panel of three male arbitrators hearing the case required her to undergo psychological and medical exams in order to seek damages for emotional distress. When she learned that arbitration rules didn't provide for an effective way to keep the sexual and other information learned in the exams confidential, Ms. Valentino settled her claims. In federal court, judges can issue orders to prevent public disclosure of confidential information.

Ms. Valentino later joined a larger lawsuit brought against Smith Barney by 22 other women, alleging that the arbitration process itself is illegal because, among other things, it provided her with fewer legal rights than she would have had in court. The suit, filed in federal court in New York, alleges a widespread pattern of sex discrimination at Smith Barney.

She also filed a separate charge with the EEOC, prompting an investigation and resulting in the finding of probable cause earlier this week. Last year, the EEOC issued such findings in only 2.2% of the 78,000 charges filed. The agency will now attempt to settle Ms. Valentino's allegations but, if talks fail, it could file a lawsuit on her behalf.

The EEOC's action comes as lawyers for Smith Barney, a unit of **Travelers Group**, are trying to wrap up a settlement

in the larger case. **Merrill Lynch** & Co., the nation's biggest brokerage firm, is trying to settle a separate sex-discrimination suit, with the help of the same mediator that is involved in the Smith Barney case.

A Merrill spokeswoman said, "We have agreed to enter into preliminary settlement discussions," but declined further comment.

Securities-industry officials downplayed the importance of the EEOC's move, citing recent federal-court decisions that supported companies' use of arbitration to settle employee disputes. It wasn't clear whether the finding in the Valentino case would have any effect on settlement talks in the larger Smith Barney suit, which people familiar with the situation said might conclude in the next several weeks.

That suit attracted heavy nationwide publicity for its allegations of brokers' mistreatment of female co-workers and, in one branch, engaging in fraternity-house antics in a basement clubhouse known as the "boom-boom room." A settlement agreement would then be submitted to a federal judge for approval.

Facing mounting criticism of mandatory arbitration, the NASD last month proposed that its rules be changed to no longer require that all licensed brokerage employees arbitrate discrimination disputes. But the new policy would allow brokerage firms to require arbitration on their own.

EEOC Policy Statement on Mandatory Arbitration

EEOC NOTICE Number 915.002, 7/10/97

1. *SUBJECT:* Policy Statement on Mandatory Binding Arbitration of Employment Discrimination Disputes as a Condition of Employment.

2. *PURPOSE:* This policy statement sets out the Commission's policy on the mandatory binding arbitration of employment discrimination disputes imposed as a condition of employment.

3. *EFFECTIVE* DATE: Upon issuance.

4. EXPIRATION DATE: As an exception to EEOC Order 205.001, Appendix B, Attachment 4, § a(5), this Notice will remain in effect until rescinded or superseded.

5. *ORIGINATOR:* Coordination and Guidance Programs, Office of Legal Counsel.

6. *INSTRUCTIONS:* File in Volume II of the EEOC Compliance Manual.

7. *SUBJECT MATTER:*

The United States Equal Employment Opportunity Commission (EEOC or Commission), the federal agency charged with the interpretation and enforcement of this nation's employment discrimination laws, has taken the position that agreements that mandate binding arbitration of discrimination claims as a condition of employment are contrary to the fundamental principles evinced in these laws. EEOC Motions on Alternative Dispute Resolution, Motion 4 (adopted Apr. 25, 1995), 80 Daily Lab. Rep. (BNA) E-1 (Apr. 26, 1995).[1] This policy statement sets out in further detail the basis for the Commission's position.

---

[1] Although binding arbitration does not, in and of itself, undermine the purposes of the laws enforced by the EEOC, the Commission believes that this is the result when it is imposed as a term or condition of employment.

I. Background

An increasing number of employers are requiring as a condition of employment that applicants and employees give up their right to pursue employment discrimination claims in court and agree to resolve disputes through binding arbitration. These agreements may be presented in the form of an employment contract or be included in an employee handbook or elsewhere. Some employers have even included such agreements in employment applications. The use of these agreements is not limited to particular industries, but can be found in various sectors of the workforce, including, for example, the securities industry, retail, restaurant and hotel chains, health care, broadcasting, and security services. Some individuals subject to mandatory arbitration agreements have challenged the enforceability of these agreements by bringing employment discrimination actions in the courts. The Commission is not unmindful of the case law enforcing specific mandatory arbitration agreements, in particular, the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 33 (1991).[2] Nonetheless, for the reasons stated herein. the Commission believes that such agreements are inconsistent with the civil rights laws.

II. The Federal Civil Rights Laws Are Squarely Based In This Nation's History And Constitutional Framework And Are Of A Singular National Importance

Federal civil rights laws, including the laws prohibiting discrimination in employment, play a unique role in American jurisprudence. They flow directly from core Constitutional

---

[2] The *Gilmer* decision is not dispositive of whether employment agreements that mandate binding arbitration of discrimination claims are enforceable. As explicitly noted by the Court, the arbitration agreement at issue in *Gilmer* was not contained in an employment contract. 500 U.S. at 25 n.2. Even if *Gilmer* had involved an agreement with an employer, the issue would remain open given the active role of the legislative branch in shaping the development of employment discrimination law. *See* discussion *infra* at section IV. B.

principles, and this nation's history testifies to their necessity and profound importance. Any analysis of the mandatory arbitration of rights guaranteed by the employment discrimination laws must, at the outset, be squarely based in an understanding of the history and purpose of these laws.

Title VII of the historic Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, was enacted to ensure equal opportunity in employment, and to secure the fundamental right to equal protection guaranteed by the Fourteenth Amendment to the Constitution.[3] Congress considered this national policy against discrimination to be of the "highest priority" (*Newman v. Piggie Park Enters.*, 390 U.S. 400, 402 (1968)), and of "paramount importance" (H.R. Rep. No. 88-914, pt. 2 (1963) (separate views of Rep. McCulloch *et al.*)),[4] *reprinted in* 1964

---

[3] *See, e.g.*, H.R. Rep. No. 88-914, pt. 1 (1963), *reprinted in* United States Equal Employment Opportunity Commission, Legislative History of Title VII and XI of the Civil Rights Act of 1964 ("1964 Leg. Hist.") at 2016 (the Civil Rights Act of 1964 was "designed primarily to protect and provide more effective means to enforce . . . *civil* rights"); H.R. Rep. No.88-914, pt.2 (1963) (separate views of Rep. McCulloch *et al.*), *reprinted in* 1964 Leg. Hist. at 2122 ("[a] key purpose of the bill . . . is to secure to all Americans the equal protection of the laws of the United States and of the several States"); Charles & Barbara Whalen, The Longest Debate: A legislative history of the 1964 Civil Rights Act 104 (1985) (opening statement of Rep. Celler on House debate of H.R. 7152: "The legislation before you seeks only to honor the constitutional guarantees of equality under the law for all. . . . [W]hat it does is to place into balance the scales of justice so that the living force of our Constitution shall apply to all people. . . ."); H.R. Rep. No. 92-238 (1971), reprinted in Senate Committee on Labor and Public Welfare, Subcommittee on Labor, Legislative History of the Equal Employment Opportunity Act of 1972 ("1972 Leg. Hist.") at 63 (1972 amendments to Title VII are a "reaffirmation of our national policy of equal opportunity in employment").

[4] William McCulloch (R-Ohio) was the ranking Republican of Subcommittee No. 5 of the House Judiciary Committee, to which the civil rights bill (H.R. 7152) was referred for initial consideration by Congress. McCulloch was among the individuals responsible for working out a compromise bill that was ultimately substituted by the full Judiciary Committee for the bill reported out by Subcommittee No. 5. His

Leg. Hist. at 2123.[5] The Civil Rights Act of 1964, 42 U.S.C. § 2000a et *seq.*, was intended to conform "[t]he practice of American democracy . . . to the spirit which motivated the Founding Fathers of this Nation—the ideals of freedom, equality, justice, and opportunity." H.R. Rep. No. 88-914, pt. 2 (1963) (separate views of Rep. McCulloch *et al.*), *reprinted in* 1964 Leg. Hist. at 2123. President John F. Kennedy, in addressing the nation regarding his intention to introduce a comprehensive civil rights bill, stated the issue as follows:

> We are confronted primarily with a moral issue. It is as old as the Scriptures and it is as clear as the American Constitution.
>
> The heart of the question is whether all Americans are to be afforded equal rights and equal opportunities, whether we are going to treat our fellow Americans as we want to be treated.

President John F. Kennedy's Radio and Television Report to the American People on Civil Rights (June 11, 1963), Pub. Papers 468, 469 (1963).[6]

---

views, which were joined by six members of Congress, are thus particularly noteworthy.

[5] *See also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (The Civil Rights Act of 1964 is a "complex legislative design directed at an historic evil of national proportions").

[6] Commitment to our national policy to eradicate discrimination continues today to be of the utmost importance. As President Clinton stated in his second inaugural address:

> Our greatest responsibility is to embrace a new spirit of community for a new century . . . . The challenge of our past remains the challenge of our future: Will we be one Nation, one people, with one common destiny, or not? Will we all come together, or come apart?
>
> The divide of race has been America's constant curse. And each new wave of immigrants gives new targets to old prejudices . . . . These forces have nearly destroyed our Nation in the past. They plague us still.

(*footnote continued*)

Title VII is but one of several federal employment discrimination laws enforced by the Commission which are "part of a wider statutory scheme to protect employees in the workplace nationwide," *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995). *See* the Equal Pay Act of 1963 ("EPA"), 29 U.S.C. § 206(d); the Age Discrimination in Employment Act of 1967 ("ADEA"), 29 U.S.C. §§ 621 *et seq.;* and the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. §§ 12101 *et seq.* The ADEA was enacted "as part of an ongoing congressional effort to eradicate discrimination in the workplace" and "reflects a societal condemnation of invidious bias in employment decisions." *McKennon*, 513 U.S. at 357. The ADA explicitly provides that its purpose is, in part, to invoke congressional power to enforce the Fourteenth Amendment. 29 U.S.C. § 12101(b)(4). Upon signing the ADA, President George Bush remarked that "the American people have once again given clear expression to our most basic ideals of freedom and equality." President George Bush's Statement on Signing the Americans with Disabilities Act of 1990 (July 26, 1990), Pub. Papers 1070 (1990 Book II).

III. The Federal Government Has The Primary Responsibility For The Enforcement Of The Federal Employment Discrimination Laws

The federal employment discrimination laws implement national values of the utmost importance through the institution of public and uniform standards of equal opportunity in the workplace. *See* text and notes *supra* in Section II. Congress explicitly entrusted the primary responsibility for the interpretation, administration, and enforcement of these standards. and the public values they embody, to the federal government. It did so in three principal ways. First, it created the Commission, initially giving it authority to investigate

---

President William J. Clinton's Inaugural Address (Jan. 20, 1997), 33 Weekly Comp. Pres. Doc. 61 (Jan. 97, 1997).

and conciliate claims of discrimination and to interpret the law, *see* §§ 706(b) and 713 of Title VII, 42 U.S.C. §§ 2000e-5(b) and 2000e-12, and subsequently giving it litigation authority in order to bring cases in court that it could not administratively resolve, *see* § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1). Second, Congress granted certain enforcement authority to the Department of Justice, principally with regard to the litigation of cases involving state and local governments. *See* §§ 706(f)(1) and 707 of Title VII, 42 U.S.C. §§ 2000e-5(f)(1) and 2000e-6. Third, it established a private right of action to enable aggrieved individuals to bring their claims directly in the federal courts, after first administratively bringing their claims to the Commission. *See* § 706(f)(1) of Title VII, 42 U.S.C. § 2000e-5(f)(1).[7]

While providing the states with an enforcement role *see* 42 U.S.C. §§ 2000e-5(c) and (d), as well as recognizing the importance of voluntary compliance by employers, *see* 42 U.S.C. § 2000e-5(b), Congress emphasized that it is the federal government that has ultimate enforcement responsibility. As Senator Humphrey stated, "[t]he basic rights protected by [Title VII] are rights which accrue to citizens of the United States, the Federal Government has the clear obligation to see that these rights are fully protected." 110 Cong. Rec. 12725 (1964). *Cf. General Tel. Co. v. EEOC,* 446 U.S. 318, 326 (1980) (in bringing enforcement actions under Title VII, the EEOC "is guided by 'the overriding public interest in equal employment opportunity . . . asserted through direct Federal enforcement' ") (*quoting* 118 Cong. Rec. 4941 (1972)).

The importance of the federal government's role in the enforcement of the civil rights laws was reaffirmed by Congress in the ADA, which explicitly provides that its purposes include "ensur[ing] that the Federal Government plays

---

[7] Section 107 of the ADA specifically incorporates the powers, remedies, and procedures set forth in Title VII with respect to the Commission, the Attorney General, and aggrieved individuals. *See* 42 U.S.C. § 12117. Similar enforcement provisions are contained in the ADEA. *See* 29 U.S.C. §§ 626 and 628.

a central role in enforcing the standards established in [the ADA] on behalf of individuals with disabilities." 42 U.S.C. § 12101(b)(3).

IV. Within This Framework, The Federal Courts Are Charged With The Ultimate Responsibility For Enforcing The Discrimination Laws

While the Commission is the primary federal agency responsible for enforcing the employment discrimination laws, the courts have been vested with the final responsibility for statutory enforcement through the construction and interpretation of the statutes, the adjudication of claims, and the issuance of relief.[8] *See, e.g., Kremer v. Chemical Constr. Corp.*, 454 U.S. 461, 479 n.20 (1982) ("federal courts were entrusted with ultimate enforcement responsibility" of Title VII); *New York Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 64 (1980) ("Of course the 'ultimate authority' to secure compliance with Title VII resides in the federal courts").[9]

A. The Courts Are Responsible For The Development And Interpretation Of The Law

As the Supreme Court emphasized in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 57 (1974), "the resolution of statutory or constitutional issues is a primary responsibility of courts, and judicial construction has proved especially necessary with respect to Title VII, whose broad language frequently can be given meaning only by reference to public law concepts." This principle applies equally to the other employment discrimination statutes.

---

[8] In addition, unlike arbitrators, courts have coercive authority, such as the contempt power, which they can use to secure compliance.

[9] *See also* H.R. Rep. No. 88-314, pt.2 (1963) (separate views of Rep. McCulloch et al.), *reprinted in* 1964 Leg. Hist. at 2150 (explaining that EEOC was not given cease-and-desist powers in the final House version of the Civil Rights Act of 1964, H.R. 7152, because it was "preferred that the ultimate determination of discrimination rest with the Federal judiciary").

While the statutes set out the basic parameters of the law, many of the fundamental legal principles in discrimination jurisprudence have been developed through judicial interpretations and case law precedent. Absent the role of the courts, there might be no discrimination claims today based on, for example, the adverse impact of neutral practices not justified by business necessity, *see Griggs v. Duke Power Co.*, 401 U.S. 424 (1974), or sexual harassment, *see Harris v. Forklift Sys., Inc.*, 510 U.S. 17 (1993); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57 (1986). Yet these two doctrines have proved essential to the effort to free the workplace from unlawful discrimination, and are broadly accepted today as key elements of civil rights law.

B. The Public Nature Of The Judicial Process Enables The Public, Higher Courts, And Congress To Ensure That The Discrimination Laws Are Properly Interpreted And Applied

Through its public nature—manifested through published decisions—the exercise of judicial authority is subject to public scrutiny and to system-wide checks and balances designed to ensure uniform expression of and adherence to statutory principles. When courts fail to interpret or apply the antidiscrimination laws in accord with the public values underlying them, they are subject to correction by higher level courts and by Congress.

These safeguards are not merely theoretical, but have enabled both the Supreme Court and Congress to play an active and continuing role in the development of employment discrimination law. Just a few of the more recent Supreme Court decisions overruling lower court errors include: *Robinson v. Shell Oil Co.*, 117 S. Ct. 843 (1997) (former employee may bring a claim for retaliation); *O'Connor v. Consolidated Coin Caterers, Corp.*, 116 S. Ct. 1307 (1996) (comparator in age discrimination case need not be under forty); *McKennon*, 513 U.S. 352 (employer may not use after-acquired evidence to justify discrimination); and *Harris*, 510 U.S. 17 (no

requirement that sexual harassment plaintiffs prove psychological injury to state a claim).

Congressional action to correct Supreme Court departures from congressional intent has included, for example, legislative amendments in response to Court rulings that: pregnancy discrimination is not necessarily discrimination based on sex (*General Elec. Co. v. Gilbert*, 429 U.S. 125 (1978), and *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977), overruled by Pregnancy Discrimination Act of 1978); that an employer does not have the burden of persuasion on the business necessity of an employment practice that has a disparate impact (*Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989), overruled by §§ 104 and 105 of the Civil Rights Act of 1991); that an employer avoids liability by showing that it would have taken the same action absent any discriminatory motive (*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), overruled, in part, by § 107 of the Civil Rights Act of 1991); that mandatory retirement pursuant to a benefit plan in effect prior to enactment of the ADEA is not prohibited age discrimination (*United Air Lines, Inc. v. McMann*, 434 U.S. 192 (1977) overruled by 1978 ADEA amendments); and, that age discrimination in fringe benefits is not unlawful (*Public Employees Retirement Sys. of Ohio v. Betts*, 492 U.S. 158 (1989), overruled by Older Workers Benefit Protection Act of 1990).

C. The Courts Play A Crucial Role In Preventing And Deterring Discrimination And In Making Discrimination Victims Whole

The courts also play a critical role in preventing and deterring violations of the law, as well as providing remedies for discrimination victims. By establishing precedent, the courts give valuable guidance to persons and entities covered by the laws regarding their rights and responsibilities, enhancing voluntary compliance with the laws. By awarding damages, backpay, and injunctive relief as a matter of public record, the courts not only compensate victims of discrimination, but pro-

vide notice to the community, in a very tangible way, of the costs of discrimination. Finally, by issuing public decisions and orders, the courts also provide notice of the identity of violators of the law and their conduct. As has been illustrated time and again, the risks of negative publicity and blemished business reputation can be powerful influences on behavior.

D. The Private Right Of Action With Its Guarantee Of Individual Access To The Courts Is Essential To The Statutory Enforcement Scheme

The private right of access to the judicial forum to adjudicate claims is an essential part of the statutory enforcement scheme. *See, e.g., McKennon*, 513 U.S. at 358 (granting a right of action to an injured employee is "a vital element" of Title VII, the ADEA, and the EPA). The courts cannot fulfill their enforcement role if individuals do not have access to the judicial forum. The Supreme Court has cautioned that, "courts should ever be mindful that Congress . . . thought it necessary to provide a judicial forum for the ultimate resolution of discriminatory employment claims. It is the duty of courts to assure the full availability of this forum." *Gardner-Denver*, 415 U.S. at 60 n.21.[10]

Under the enforcement scheme for the federal employment discrimination laws, individual litigants act as "private attorneys general." In bringing a claim in court, the civil rights plaintiff serves not only her or his private interests, but also serves as "the chosen instrument of Congress to vindicate 'a policy that Congress considered of the highest priority.' " *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 418

---

[10] *See also* 118 Cong. Rec. S7168 (March 6, 1972) (section-by-section analysis of H.R. 1746, the Equal Opportunity Act of 1972, as agreed to by the conference committees of each House; analysis of § 706(f)(1) provides that, while it is hoped that most cases will be handled through the EEOC with recourse to a private lawsuit as the exception, "as the individual's rights to redress are paramount under the provisions of Title VII it is necessary that all avenues be left open for quick and effective relief").

(1978) (*quoting Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968)). *See also McKennon*, 513 U.S. at 358 ("[t]he private litigant who seeks redress for his or her injuries vindicates both the deterrence and compensation objectives of the ADEA").

V. Mandatory Arbitration Of Employment Discrimination Disputes "Privatizes" Enforcement Of The Federal Employment Discrimination Laws, Thus Undermining Public Enforcement Of The Laws

The imposition of mandatory arbitration agreements as a condition of employment substitutes a private dispute resolution system for the public justice system intended by Congress to govern the enforcement of the employment discrimination laws. The private arbitral system differs in critical ways from the public judicial forum and, when imposed as a condition of employment, it is structurally biased against applicants and employees.

A. Mandatory Arbitration Has limitations That Are Inherent And Therefore Cannot Be Cured By The Improvement Of Arbitration Systems

That arbitration is substantially different from litigation in the judicial forum is precisely the reason for its use as a form of ADR. Even the fairest of arbitral mechanisms will differ strikingly from the judicial forum.

1. The Arbitral Process Is Private In Nature And Thus Allows For Little Public Accountability

The nature of the arbitral process allows—by design—for minimal, if any, public accountability of arbitrators or arbitral decision-making. Unlike her or his counterparts in the judiciary, the arbitrator answers only to the private parties to the dispute, and not to the public at large. As the Supreme Court has explained:

> A proper conception of the arbitrator's function is basic. He is not a public tribunal imposed upon the parties by superior authority which the parties are obliged to accept. He has no general charter to administer justice for a community which transcends the parties. He is rather part of a system of self-government created by and confined to the parties. . . .
>
> *United Steelworkers of Am. v. Warrior and Gulf Navigation Co.*, 363 U.S. 574, 581 (1960) (quoting from Shulman, *Reason, Contract, and Law in Labor Relations*, 68 Harv. L. Rev. 999, 1016 (1955)).

The public plays no role in an arbitrator's selection s/he is hired by the private parties to a dispute. Similarly, the arbitrator's authority is defined and conferred not by public law, but by private agreement.[11] While the courts are charged with giving force to the public values reflected in the antidiscrimination laws, the arbitrator proceeds from a far narrower perspective: resolution of the immediate dispute. As noted by one commentator, "[a]djudication is more likely to do justice than . . . arbitration . . . precisely because it vests the power of the state in officials who act as trustees for the public, who are highly visible, and who are committed to reason." Owen Fiss, *Out of Eden*, 94 Yale L.J. 1669, 1673 (1985).

Moreover, because decisions are private, there is little, if any, public accountability even for employers who have been determined to have violated the law. The lack of public disclosure not only weakens deterrence *(see* discussion *supra*

---

[11] Article 111 of the Constitution provides Several judges with life tenure and salary protection to safeguard the independence of the judiciary. No such safeguards apply to the arbitrator. The importance of these safeguards was stressed in the debates on the 1972 amendments to Title VII. Senator Dominick, in offering an amendment giving the EEOC the right to file a civil action in lieu of cease-and-desist powers, explained that the purpose of the amendment was to "vest adjudicatory power where it belongs—in impartial judges shielded from political winds by life tenure." 1972 Leg. Hist. at 549. The amendment was later revised in minor respects and adopted by the Senate.

at 8), but also prevents assessment of whether practices of individual employers or particular industries are in need of reform. "The disclosure through litigation of incidents or practices which violate national policies respecting nondiscrimination in the work force is itself important, for the occurrence of violations may disclose patterns of noncompliance resulting from a misappreciation of [Title VII's] operation or entrenched resistance to its commands, either of which can be of industry-wide significance." *McKennon*, 513 U.S. at 358-59.

2. *Arbitration, By Its Nature, Does Not Allow For The Development Of The Law*

Arbitral decisions may not be required to be written or reasoned, and are not made public without the consent of the parties. Judicial review of arbitral decisions is limited to the narrowest of grounds.[12] As a result, arbitration affords no opportunity to build a jurisprudence through precedent.[13]

---

[12] Under the Federal Arbitration Act, arbitral awards may be vacated only for procedural impropriety such as corruption, fraud or misconduct. 9 U.S.C. § 10. Judicially created standards of review allow an arbitral award to be vacated where it clearly violates a public policy that is explicit, well-defined, "dominant" and ascertainable from the law, *see United Paperworkers Int'l Union v. Misco, Inc.*, 484 U.S. 29, 43 (1987), or where it is in "manifest disregard" of the law, *see Wilko v.* Swan, 346 U.S. 427, 436-37 (1953). The latter standard of review has been described by one commentator as "a virtually insurmountable" hurdle. *See* Bret F. Randall, *The History, Application, and Policy of the Judicially Created Standards of Review for Arbitration Awards*, 1992 BYU L. Rev. 759 767. *But cf. Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1486-87 (1997) (in the context of mandatory employment arbitration of statutory disputes, the court interprets judicial review under the "manifest disregard" standard to be sufficiently broad to ensure that the law has been properly interpreted and applied).

[13] Congress has recognized the inappropriateness of ADR where "a definitive or authoritative resolution of the matter is required for precedential value, and such a proceeding is not likely to be accepted generally as an authoritative precedent," *see* Alternative Dispute Resolution Act, 5 U.S.C. § 572(b)(1) (providing for use of ADR by federal administrative agencies where the parties agree); or where "the case involves

Moreover, there is virtually no opportunity for meaningful scrutiny of arbitral decision-making. This leaves higher courts and Congress unable to act to correct errors in statutory interpretation. The risks for the vigorous enforcement of the civil rights laws are profound. *See* discussion *supra* at section IV. B.

3. Additional Aspects Of Arbitration Systems Limit Claimants' Rights In Important Respects

Arbitration systems, regardless of how fair they may be, limit the rights of injured individuals in other important ways. To begin with, the civil rights litigant often has available the choice to have her or his case heard by a jury of peers, while in the arbitral forum juries are, by definition, unavailable. Discovery is significantly limited compared with that available in court and permitted under the Federal Rules of Civil Procedure. In addition, arbitration systems are not suitable for resolving class or pattern or practice claims of discrimination. They may, in fact, protect systemic discriminators by forcing claims to be adjudicated one at a time, in isolation, without reference to a broader—and more accurate—view of an employer's conduct.

---

complex or novel legal issues," *see* Judicial Improvements and Access to Justice Act, 28 U.S.C. § 652(c)(2) (providing for court-annexed arbitration; §§ 652(b)(1) and (2) also require the parties' consent to arbitrate constitutional or statutory civil rights claims). Similar findings were made by the U.S. Secretary of Labor's Task Force on Excellence in State and Local Government Through Labor-Management Cooperalion ("Brock Commission"), which was charged with examining labor-management cooperation in state and local government. The Task Force's report, "Working Together for Public Service" (1996) ("Brock Report"), recommended "Quality Standards and Key Principles for Effective Alternative Dispute Resolution Systems for Rights Guaranteed by Public Law and for Other Workplace Disputes" which include that "ADR should normally not be used in cases that represent tests of significant legal principles or class action." Brock Report at 82.

B. Mandatory Arbitration Systems Include Structural Biases Against Discrimination Plaintiffs

In addition to the substantial and inevitable differences between the arbitral and judicial forums that have already been discussed, when arbitration of employment disputes is imposed as a condition of employment, bias inheres against the employee.[14]

First, the employer accrues a valuable structural advantage because it is a "repeat player." The employer is a party to arbitration in all disputes with its employees. In contrast, the employee is a "one-shot player"; s/he is a party to arbitration only in her or his own dispute with the employer. As a result, the employee is generally less able to make an informed selection of arbitrators than the employer, who can better keep track of an arbitrator's record. In addition, results cannot but be influenced by the fact that the employer, and not the employee, is a potential source of future business for the arbitrator.[15] A recent study of nonunion employment law

---

[14] A survey of employment discrimination arbitration awards in the securities industry, which requires as a condition of employment that ail brokers resolve employment disputes through arbitration, found that "employers stand a greater chance of success in arbitration than in court before a jury" and are subjected to "smaller" damage awards. *See* Stuart H. Bompey & Andrea H. Stempel, *Four Years Later: A Look at Compulsory Arbitration of Employment Discrimination Claims After Gilmer v. Interstate/Johnson Lane Corp.*, 21 Empl. Rel. L.J. 21, 43 (autumn 1995).

[15] *See, e.g.*, Julius G. Getman, *Labor Arbitration and Dispute Resolution*, 88 Yale L.J. 916, 936 (1979) ("an arbitrator could improve his chances of future selection by deciding favorably to institutional defendants: as a group, they are more likely to have knowledge about past decisions and more likely to be regularly involved m the selection process"); Reginald Alleyne, *Statutory Discrimination Claims: Rights Waived and Lost in the Arbitration Forum*, 13 Hofstra Lab. L.J. 381, 428 (Spring 1996) ("statutory discrimination grievances relegated to . . . arbitration forums are virtually assured employer-favored outcomes," given "the manner of selecting, controlling, and compensating arbitrators, the privacy of the process and how it catalytically arouses an arbitrator's desire to be acceptable to one side").

cases[16] found that the more frequent a user of arbitration an employer is, the better the employer fares in arbitration.[17]

In addition, unlike voluntary post-dispute arbitration—which must be fair enough to be attractive to the employee—the employer imposing mandatory arbitration is free to manipulate the arbitral mechanism to its benefit. The terms of the private agreement defining the arbitrator's authority and the arbitral process are characteristically set by the more powerful party, the very party that the public law seeks to regulate. We are aware of no examples of employees who insist on the mandatory arbitration of future statutory employment disputes as a condition of accepting a job offer—the very suggestion seems far-fetched. Rather, these agreements are imposed by employers because they believe them to be in their interest, and they are made possible by the employer's superior bargaining power. It is thus not surprising that many employer-mandated arbitration systems fail far short of basic concepts of fairness. Indeed, the Commission has challenged—by litigation, *amicus curiae* participation, or Commissioner charge—particular mandatory arbitration agreements that include provisions flagrantly eviscerating core rights and remedies that are available under the civil rights laws.[18]

---

16 Arbitration of labor disputes pursuant to a collective bargaining agreement is less likely to favor the employer as a repeat-player because the union, as collective bargaining representative, is also a repeat-player.

17 *See* Lisa Gingham, "Employment Arbitration: The effect of repeat-player status, employee category and gender on arbitration outcomes," (unpublished study on file with the author, an assistant professor at Indiana U. School of Public & Environmental Affairs).

18 Challenged agreements have included provisions that: (1) impose filing deadlines far shorter than those provided by statute; (2) limit remedies to "out-of-pocket" damages; (3) deny any award of attorney's fees to the civil rights claimant, should s/he prevail; (4) wholly deny or limit punitive and liquidated damages; (5) limit back pay to a time period much shorter than that provided by statute; (6) wholly deny or limit front pay to a time period far shorter than that ordered by courts; (7) deny any and all discovery; and (8) allow for payment by each party of one-half of

The Commission's conclusions in this regard are consistent with those of other analyses of mandatory arbitration. The Commission on the Future of Worker-Management Relations (the "Dunlop Commission") was appointed by the Secretary of Labor and the Secretary of Commerce to, in part, address alternative means to resolve workplace disputes. In its Report and Recommendations (Dec. 1994) ("Dunlop Report"), the Dunlop Commission found that recent employer experimentation with arbitration has produced a range of programs that include "mechanisms that appear to be of dubious merit for enforcing the public values embedded in our laws." Dunlop Report at 27. In addition, a report by the U.S. General Accounting Office, surveying private employers' use of DAR mechanisms, found that existing employer arbitration systems vary greatly and that "most" do not conform to standards recommended by the Dunlop Commission to ensure fairness. *See* "Employment Discrimination: Most Private Sector Employers Use Alternative Dispute Resolution" at 15, HEHS-95-150 (July 1995).

The Dunlop Commission strongly recommended that binding arbitration agreements not be enforceable as a condition of employment:

> The public rights embodied in state and federal employment law—such as freedom from discrimination in the workplace . . .—are an important part of the social and economic protections of the nation. Employees required to accept binding arbitration of such disputes would face what for many would be an inappropriate choice: give up your right to go to court, or give up your job.

Dunlop Report at 32. The Brock Commission *(see supra* n.13) agreed with the Dunlop Commission's opposition to mandatory arbitration *of* employment disputes and recommended that all employee agreements to arbitrate be voluntary and

---

the costs of arbitration and, should the employer prevail, require the claimant, in the arbitrator's discretion, to pay the employer's share of arbitration costs as well.

post-dispute. Brock Report at 81-82. In addition, the National Academy of Arbitrators recently issued a statement opposing mandatory arbitration as a condition of employment "when it requires waiver of direct access to either a judicial or administrative forum for the pursuit of statutory rights." *See* National Academy of Arbitrators' Statement and Guidelines (adopted May 21, 1997), 103 Daily Lab. Rep. (BNA) E-1 (May 29, 1997).

C. Mandatory Arbitration Agreements Will Adversely Affect The Commission's Ability To Enforce The Civil Rights Laws

The trend to impose mandatory arbitration agreements as a condition of employment also poses a significant threat to the EEOC's statutory responsibility to enforce the federal employment discrimination laws. Effective enforcement by the Commission depends in large part on the initiative of individuals to report instances of discrimination to the Commission. Although employers may not lawfully deprive individuals of their statutory right to file employment discrimination charges with the EEOC or otherwise interfere with individuals' protected participation in investigations or proceedings under these laws,[19] employees who are bound by mandatory arbitration agreements may be unaware that they nonetheless may file an EEOC charge. Moreover, individuals are likely to be discouraged from coming to the Commission when they know they will be unable to litigate their claims in court.[20] These chilling effects on charge filing undermine the

---

[19] *See* "Enforcement Guidance on non-waivable employee rights under Equal Employment Opportunity Commission (EEOC) statutes." Vol. III EEOC Compl. Man. (BNA) at N:2329 (Apr. 10, 1997).

[20] The Commission remains able to bring suit despite the existence of a mandatory arbitration agreement because it acts "to vindicate the public interest in preventing employment discrimination," *General Tel.*, 446 U.S. at 326. *Cf.* S.Rep. No. 101-263 (1990) *reprinted in*, Legislative History of The Older Workers Benefit Protection Act, at 354 (amendment to ADEA § 626(f)(4), which provides that "no waiver agreement may

Commission's enforcement efforts by decreasing channels of information, limiting the agency's awareness of potential violations of law, and impeding its ability to investigate possible unlawful actions and attempt informal resolution.

VI. Voluntary, Post-Dispute Agreements To Arbitrate Appropriately Balance The Legitimate Goals Of Alternate Dispute Resolution And The Need To Preserve the Enforcement Framework Of The Civil Rights Laws

The Commission is on record in strong support of *voluntary* alternative dispute resolution programs that resolve employment discrimination disputes in a fair and credible manner, and are entered into after a dispute has arisen. We reaffirm that support here. This position is based on the recognition that while even the best arbitral systems do not afford the benefits of the judicial system, well-designed ADR programs, including binding arbitration, can offer in particular cases other valuable benefits to civil rights claimants, such as relative savings in time and expense.[21] Moreover, we recognize that the judicial system is not, itself, without drawbacks. Accordingly, an individual may decide in a particular case to forego the judicial forum and resolve the case through arbitration. This is consistent with civil rights enforcement as long as the individual's decision is freely made after a dispute has arisen.[22]

---

affect the Commission's rights and responsibilities to enforce [the ADEA]," was intended "as a clear statement of support for the principle that the elimination of age discrimination in the workplace is a matter of public as well as private interest"). As a practical matter, however, the Commission's ability to litigate is limited by its available resources.

[21] Despite conventional wisdom to the contrary, the financial costs of arbitration can be significant and may represent no savings over litigation in a judicial forum. These costs may include the arbitrator's fee and expenses; fees charged by the entity providing arbitration services, which may include filing fees and daily administrative fees; space rental fees; and court reporter fees.

[22] The Dunlop Commission similarly supported voluntary forms of ADR, but based its opposition to mandatory arbitration on the premise

VII. Conclusion

The use of unilaterally imposed agreements mandating binding arbitration of employment discrimination disputes as a condition of employment harms both the individual civil rights claimant and the public interest in eradicating discrimination. Those whom the law seeks to regulate should not be permitted to exempt themselves from federal enforcement of civil rights laws. Nor should they be permitted to deprive civil rights claimants of the choice to vindicate their statutory rights in the courts—an avenue of redress determined by Congress to be essential to enforcement.

Processing Instructions For The Field And Headquarters

1. Charges should be taken and processed in conformity with priority charge processing procedures regardless of whether the charging party has agreed to arbitrate employment disputes. Field offices are instructed to closely scrutinize each charge involving an arbitration agreement to determine whether the agreement was secured under coercive circumstances (e.g., as a condition of employment). The Commission will process a charge and bring suit, in appropriate cases, notwithstanding the charging party's agreement to arbitrate.

2. Pursuant to the statement of priorities in the National Enforcement Plan, *see* § B(1)(h), the Commission will continue to challenge the legality of specific agreements that mandate binding arbitration of employment discrimination disputes as a condition of employment. *See, e.g.*, Briefs of the EEOC as *Amicus Curiae* in *Seus v. John Nuveen & Co.*, No. 96-CV-5971 (E.D. Pa.) (Br. filed Jan. 11, 1997); *Gibson v. Neighborhood Health Clinics, Inc.*, No. 96-2652 (7th Cir.) (Br. filed Sept. 23, 1996); *Johnson v. Hubbard Broadcasting, Inc.*, No. 4-96-107 (D. Minn.) (Br. Filed May 17, 1996);

---

that the avenue of redress for statutory employment rights should be chosen by the individual rather than dictated by the employer. Dunlop Report at 33.

Great Western Mortgage Corp. v. Peacock, No. 96-5273 (3d Cir.) (Br. filed July 24, 1996).

Date 7/10/97

/s/ Gilbert F. Casellas
Chairman